Nos. A19-0665

State of Minnesota

In Court of Appeals

Michelle L. MacDonald, MacDonald Law Firm, LLC,

Appellants,

v.

Michael Brodkorb, individually and doing business as www.MissinginMinnesota.com, Missing in Minnesota, LLC, and John and Mary Does,

Respondents.

APPELLANTS' BRIEF

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STATEMENT OF THE LEGAL ISSUES

I. **DID THE COURT ERR BY FAILING TO REQUIRE AN ANSWER, AFTER DENYING A DEFAULT JUDGMENT THEREBY PREVENTING PLAINTIFFS FROM DISCOVERY IN ORDER TO LITIGATE THE ALLEGATIONS OF DEFAMATION IN THE COMPLAINT?**

The Ramsey County Court denied a default judgment to Plaintiffs ruling that Defendants "otherwise defended" the lawsuit, and then failed to require the Defendants to Answer the complaint so that discovery and litigation could proceed regarding the Plaintiffs' defamation claims. *See* Appellants' Addendum at Add.1.

Most apposite authorities:

Minn.R.Civ.P. 55.01; Minn.R.Civ.P. 12.01; Doe v. Legacy Broad. of MN, Inc., 504 N.W.2d 527, 528 (Minn. App. 1993); Bentley v. Kral, 26 N.W.2d 532, 533 (1947)

II. **DID THE COURT VIOLATE PROCEDURAL DUE PROCESS BY DENYING DEFAULT JUDGMENT AND ORDERING A SUMMARY JUDGMENT DISMISSAL IN THE SAME ORDER ON PLAINTIFFS' CLAIMS OF DEFAMATION WHEN DEFENDANTS HAD NOT ANSWERED THE COMPLAINT AND THERE WAS NO DISCOVERY ?**

After denying Plaintiffs motion for default judgment, the Ramsey County District Court granted summary judgment dismissal to Defendants in the same order, even though there was no Answer or discovery and questions of fact remained regarding the defamation claims by Appellants. *See* Appellants' Addendum at Add.1.

Most apposite authorities:

U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 7; Nord v. Herreid, 305 NW 2d 337 (Minn. 1981); Minn.R.Civ.P. 56.03; *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). *In re Khan,* 804 N.W.2d 132, 137 (Minn. App. 2011). *Plocher v. Comm'r of Pub. Safety,* 681 N.W.2d 698, 702 (Minn. App. 2004).

III. WHETHER THE COURT DENIED DUE PROCESS IN GRANTING SUMMARY JUDGMENT DISMISSAL BY RULING DEFENDANTS COULD NOT BE FOUND LIABLE ON PLAINTIFFS' CLAIMS FOR DEFAMATION BY IMPLICATION WHEN THERE WAS NO ANSWER OR DISCOVERY AS TO FACTS INCLUDING WHETHER THE PLAINTIFF WAS A PUBLIC OFFICIAL OR A PRIVILEGE APPLIED FOR DEFENDANTS?

The Ramsey County Court erred by ordering summary judgment on Plaintiffs' claims for defamation by implication without the benefit of discovery and misapplied Minn.R.Civ.P. 56.03. The court granted summary judgment to Defendants even though there was no discovery and there were questions of fact remaining regarding Plaintiffs defamation by implication claims. *See* Appellants' Addendum at Add.1.

Most apposite authorities:

Diesen v. Hessburg, 455 N.W. 2d 446, 451 (Minn. 1990) cert. denied, 498 U.S. 1119, (1991). Michaelis v. CBS, Inc., 119 F.3d 697 (8th Cir. 1997); Toney v. WCCO Television, Midwest Cable & Satellite, Inc., 85 F.3d 383 (8th Cir. 1996)

STATEMENT OF THE CASE

This case involves the defamation, defamation per se and defamation by implication claims of Plaintiffs, Michelle MacDonald and MacDonald Law Firm, LLC by Defendants, Michael Brodkorb and Missing in Minnesota, LLC on their website and disseminated on social media, including violations of the ethics of professional journalism. This appeal arises out of the failure of the court to order the Defendants to answer the Plaintiffs' complaint after denying default judgment so that discovery and the litigation could proceed and granting dismissal by summary judgment of Plaintiffs' claims for defamation in the same order, denying procedural due process pursuant to U.S. Const. amend. XIV § 1 and Minn. Const. art. 1, § 7. The lower court was nonresponsive as to Plaintiffs' request for injunctive relief and removal of the statements and a photograph from its website, blogs, twitter, facebook and related media outlets. (Ramsey County Court File No. 62-CV-18-4145). (A.1) The Plaintiffs' Complaint contained factual allegations supporting all claims for defamation against the Defendants (A. 26-54). The Complaint further alleged facts that Defendants had violated the Code of Ethics of the Society of Professional Journalists. (A. 55)

The complaint was personally served on Defendant Brodkorb on June 14, 2019, and on Missing in Minnesota, LLC on June 14, 2019 (A. 57, 58). The case was captioned in Ramsey County where the Defendant, Missing in Minnesota, LLC resides. The case was erroneously e-filed in Dakota County on June 14, 2019, and Plaintiffs immediately re-filed by e-file in Ramsey County, on June 20, 2019, where a Judge was assigned (A.59). A letter was written by to the Dakota County Court Administrator to correct the e-filing

error (A.60). Respondents immediately retained attorney Nathan Hanson, who was Defendant Missing in Minnesota, LLC's registered agent in Ramsey County, and who had received cease and desist letters regarding the defamation and false image disseminated by their website from Ms. MacDonald. (A 44, 45, 46 – Exhibits 4, 5, 7 , 9 and 10 to Complaint) In response to the Complaint, Defendants' attorney filed a Motion for Rule 11 sanctions in both Dakota and Ramsey County against attorney Michelle MacDonald and Larry Frost on June 25, 2018 and against her attorney Karlowba Powell on July 25, 2018 (A.61, 63) for filing the same matter in two counties. The motions for Rule 11 were dismissed in Dakota County, and on September 6, 2018, Defendants withdrew their Rule 11 sanctions motion in the Ramsey County case. (A.4) On September 18, 2018, Plaintiffs moved for default judgment pursuant to Minn. R. Civ. P. 55.01 on the grounds that Defendants failed to file a formal written answer to the Complaint as required by the rules. The Plaintiffs claimed that Defendants had not produced a formal Answer to the Complaint or taken action to remove the statements and objectionable images from the website and social media, and replace it with a statement the deletes the defamatory language (A.65-66). The Defendants responded with a motion for summary judgment pursuant to Minn. R. Civ. P. 56 filed September 19, 2018 requesting dismissal of all claims. (A.69) In support of their motion, Defendants provided a short affidavit of one of the Defendant's, Michael Brodkorb denying that the statements he made relating to three of the claims of Appellants were false (A. 71) Defendants never responded in writing to the motion for default judgment. Appellants' responded to the motion for summary judgment with a memorandum and by verifying the

allegations in the Complaint, alleging issues of contested fact and that dismissal by summary judgment was premature. Plaintiffs alleged that presuming Defendants overcome their failure to Answer Plaintiffs' Complaint and default judgment, an Answer was required and litigation should proceed. The court heard oral arguments on November 1, 2018. In its Order of March 1, 2019, the court court denied the Plaintiffs' motion for default judgment, and granted dismissal by summary judgment to the Defendants against on all of the Plaintiffs' claims of defamation, defamation per se and defamation by implication (A.1-25). On April 30, 2019. the Plaintiffs appealed the court's decision. (A.76)

STATEMENT OF THE FACTS

Appellants' facts were set forth in their Complaints for defamation, defamation per se and defamation by implication, dated on June 14, 2019, which included Exhibits to their complaint filed confidentially to avoid further defamation with the filing of the lawsuit, including an objectionable false image. (A. 1) In contrast, the Respondents' assertion of the facts were contained in a brief affidavit of Defendant Michael Brodkorb purporting to support their motion for summary judgment dismissal. (A.71) The Appellants' Complaint consisted of numerous factual allegations concerning false statements and false implications made by Respondents on their website and social media with full knowledge that it would be disseminated to the general public. Appellants alleged that Defendants' false statements or false implications had been republished by Defendants and others on numerous social media sites, through twitter and Facebook and

others, and remained prominently displayed on their website, including the false image being on Google.

Appellant, Ms. MacDonald alleged that in July of 2014, Defendant Brodkorb contacted her and she began an honest dialogue with him, including numerous meetings in person, by telephone, including communications by text and email where Defendant Brodkorb asked for, or Ms. MacDonald volunteered numerous documentation about cases she was involved in, including links, court file numbers, court pleadings, video, security video, and photographs. (A.35). On April 24, 2015, Ms. MacDonald texted Defendant Brodkorb that she was no longer at liberty to talk with him because her client, Sandra Grazzini-Rucki, was being investigated for a crime by police (A.38, 39) .She alleged that after she stopped speaking to Defendant Brodkorb and after her client received a harassment restraining order against him, that he started a website missinginminnesota.com to defame her.

In October 22, 2015, Ms. MacDonald texted Defendant Brodkorb with a photo of her with Governor Mark Dayton where she was accepting an award, and he began defaming her telling people she was a "person of interest" in the criminal case against her client. Then on February 16, 2016, Brodkorb falsely reported in a tweet that Ms. MacDonald had a DUI conviction, when in fact Ms. MacDonald had been acquitted of DUI. (A.40).

Ms. MacDonald claims that Defendant Brodkorb may have ceased the defamatory remarks and posts for several months, until he started doing business as Missing in Minnesota, in June of 2016, joined by Allison Mann, who is David Rucki's paralegal,

and continued in this venture on the website on and after May 24, 2017. (A.40). Ms. MacDonald alleges that after she stopped communicating with him and her client obtained a restraining order against him, Defendant Brodkorb:

- appeared on a radio program, and defamed her. (A.28)
- made numerous telephone contacts to her associates, colleagues, potential and former clients. (A.28, 40)
- tweeted false representations relating to Ms. MacDonald's former clients and colleagues and blocked her. (A.28, 29)
- defamed her on his website and in posts to turn friends, colleagues, clients, supporters and the general public against Ms. MacDonald . (A.29)
- made numerous verbal statements to a number of Minnesota citizens and public servants in an effort to injure Ms. MacDonald's reputation in the community .(A29-30)
- blocked Ms. MacDonald and others who support her from his social media, and from emails to obstruct her from any defense or response in order to promote and disseminate the defamatory content only. (A30)
- intentionally omitted material and information that he knew about, or provided to him, on the website and his other social media, consistently targeting Ms. MacDonald for defamation, false accusations and character assassination, by overt misrepresentations. (A.30)
- ramped ups up their false statements, repeating them over and over, both on the website and social media, in phone calls, including false images of Ms. MacDonald, as if

a mug shot, drunk and mentally ill. (A 30)

Before filing the lawsuit, Ms. MacDonald sent several cease and desist letters and emails regarding the defamation and photo, including those attached to her complaint to Defendant Brodkorb and his attorneys. (See Exhibits 4.1 – letter of August 3, 2016; Exhibit 4.3 – letter of August 18, 2016; Exhibit 5 – email of September 22, 2016; Exhibit 7.1 – letter of January 5, 2017; Exhibit 8.1- letter of January 10, 2017; Exhibit 10.1- letter of March 17, 2017; Exhibit 10.3-letter of April 4, 2017)

Violation of the Code of Ethics for Journalists and "Fake news"

Ms. MacDonald further alleged that she had provided Defendant Brodkorb with the Code of Ethics for professional journalists which she exhibited to the Complaint. (A.55) (See Exhibits 1, 4.1) and that he disseminated "fake news" by committing violations of the codes of ethics promulgated by the Society of Professional Journalists including that Defendant Brodkorb and Missing in Minnesota:

a. Obstructing public enlightenment which is the forerunner of justice and the foundation of democracy,"

b. Failure to "seek the truth and providing fair and comprehensive accounts of events and issues,"

c. Failure to "strive to serve the public with thoroughness and honesty,"

d. Failure to have "professional integrity" and "credibility,"

e. Failure to be dedicated to "ethical behavior" and "the principals and standards" of practice for journalists and deliberate distortion,

f. Failing to "seek the truth and report it" ,

Ms. MacDonald further alleged that Defendants failed to be "honest, fair and courageous in gathering, reporting and interpreting information" including the failure to:

g. "test the accuracy of the information from all sources and exercise care to avoid inadvertent error,"

h. Give "subjects of news stories" the "opportunity to respond" to allegations of wrongdoing,

i. "identify sources" their "reliability", and question their motives, in particular David Rucki and his paralegal, Allison Mann,

j. "make certain that "headlines, news teases, and promotional material, photos, video, audio, graphics, sound bites and quotations do not misrepresent", and they do not oversimplify or highlight incidents out of context,"

k. Refrain from "distorting the context of news photos or video,"

l. Avoid "misleading re-enactments" or "staged news events,"

m. "support the open exchange of views even views [he] finds repugnant,"

n. "give voice to the voiceless,"

o. "distinguish between advocacy and news reporting,"

p. To label analysis and "not misrepresent fact or content,"

q. "distinguish news from advertising," (A31-32)

As for the photograph, Ms. MacDonald had years earlier provided Defendant Brodkorb with information about the trauma she experience,describing the inappropriate treatment and traumatic experiences, and included photographic images provided to Brodkorb. (A.37) She included her civil rights complaint and photographs Dakota County Sherriff's

insisted on taking pictures of her referring to Ms. MacDonald as "beautiful". He was aware that Ms. MacDonald's case for contempt for taking a phots was dismissed for lack of probable cause and Dakota County Sheriffs had continued their abuse and intimidation of MacDonald by releasing at least one of these pictures to reporters.

Defendant Brodkorb was aware of the September 112, 2013 photograph and its origin , and the photo never surfaced at all until years later when posted by Defendant Brodkorb on the website and social media. (A37-38). Since the first use of the image by Defendants, and after the numerous notices to cease and desist, Brodkorb and the website repeatedly posted, adding the image of Ms. MacDonald, now throughout the entire website, and on various posts, and social media, alongside mugshots convicted felons, and includes the photo on nearly every page, including the front page, sometimes beside a headshot of her. (A.46)

In every story, Ms. MacDonald is wrongly portrayed as involved in criminal activity, under criminal investigation, drunk and mentally ill, all with the knowledge of the truth about Ms. MacDonald, by Defendants as a person, and lawyer. Defendant Brodkorb even continued after knowing the true origin and circumstances of the images, using it on nearly all of his posts, and repeatedly tweets out the image with any post about Ms. MacDonald labeling her a "person of interest". This, even after July and September, 2016 when all of the Defendants in the felony criminal case against her client, Sandra Grazzini-Rucki have been investigated, arrested, tried, convicted and sentenced. (A.46-47)

ARGUMENT

I. THE COURT ERRED BY FAILING TO REQUIRE AN ANSWER, AFTER DENYING A DEFAULT JUDGMENT THEREBY PREVENTING PLAINTIFFS FROM DISCOVERY IN ORDER TO LITIGATE THE ALLEGATIONS OF DEFAMATION IN THE COMPLAINT VIOLATING DUE PROCESS?

A. *Standard of Review* ---Default Judgment

We review the decision to grant or deny a motion for default judgment for an abuse of discretion. *Black v. Rimmer,* 700 N.W.2d 521, 525 (Minn. App. 2005)

B. After Denying Default Judgement, the Court Erred by Failing to Require an Answer, Discovery and Proceeding with the Litigation.

Appellants served the original Summons and Complaint on Defendants on June 14, 2018 and served the Amended Complaint on counsel for Defendant, on July 24, 2018. The Defendants provided *no* Answer to the Plaintiffs' Complaint, and instead filed a Rule 11 motions against Ms. MacDonald and her attorneys in two counties where the Complaint was filed due to an e-filing clerical error. The rule 11 motions were dismissed in Dakota County on August 17, 2018, and withdrawn by Respondents in Ramsey County on September 6, 2018. (A. 4)

Rule 12.01 of the Minnesota Rules of Civil Procedure requires that defendants provide an answer to a complaint or a responsive motion within twenty (20) days of service of the Summons and Complaint. The consequence of a defendant's failure to respond is addressed in Rule 55.01, which states:

> When a party against whom a judgment for affirmative relief is sought has failed to plead *or otherwise defend* (emphasis added)within the time allowed therefor by these rules or by statute, and that fact is made to appear by

affidavit, judgment by default shall be entered against that party. Minn. Civ. Pro. Rule 12.01.

The key to a court addressing rule 12.01 is the words "otherwise defend". Here the court found that Defendants' rule 11 motion, while not an attack on the pleadings, constituted "a formal act by defendants to position themselves in opposition to the Plaintiffs' complaint." (A.11) The court ruled that the Rule 11 sanctions motion " appears to meet the definition of "otherwise defend", even though outside the 20 days.

On appeal, the Appellants do not dispute the courts findings that Defendants "otherwise defended" the Plaintiffs action to avoid a default judgment. The court found that the motion for sanctions was filed only 11 days after their time to answer the original complaint expired, and that "the record evidences multiple court filings in both Dakota and the Ramsey county cases in June and July 2018. " (A. 12) The court also found that the sanctions motion alerted the Plaintiffs of their intention to contest the defamation claim, and that "Defendants then appropriately withdrew their sanctions motion " (A12)

But having found that the Defendants otherwise defended the lawsuit and that the Plaintiffs were not entitled to a default judgment, the next logical step was to require an answer so that the discovery and the litigation could proceed. MINN. R. CIV. P. 55.01(a)–(b). *See also Doe v. Legacy Broad. of MN, Inc.*, 504 N.W.2d 527, 528 (Minn. App. 1993) (holding default judgment may be entered against party who fails to plead or otherwise defend claim within time allowed by law). A default judgment is a "judgment entered against a defendant who has failed to plead or otherwise defend against the

plaintiff's claim, often by failing to appear at trial." Cole v. Metro. Council HRA, 686 N.W.2d 334, 337 (Minn.App.2004). A default judgment may be entered against a non-appearing party when the plaintiff introduces sufficient evidence at trial to receive a judgment. See, e.g., Pedersen v. Daly, 238 N.W.2d 620, 621–22 (1976) (affirming a district court's imposition of a default judgment in that context); see also 2 David F. Herr & Roger S. Haydock, Minnesota Practice § 55.4 (5th ed.2011) (stating that a party that "serves a responsive pleading but fails to appear at trial to litigate the matter or to contest the evidence" is not necessarily subject to entry of default judgment against it, because the participating party must still "present evidence to prove the allegations of the complaint").

C. The Court Used Case Law Supporting Reopening A Default Judgment that Was Granted, and Requiring An Answer and Discovery Was the Next Logical Step.

The Court ruled that the dismissed Rule 11 motion precluded a default, and did not grant the default judgment due to the Defendants' failure to answer. That should have concluded the analysis and answer should have been required. Instead the court proceeded to use case law where parties had appealed default judgments that were granted by the district court, or where the district court expanded the time to provide an answer, and the appellate court vacated the default judgment.

Once a court determines that a party is in default, the complaint's factual allegations, except those related to damages, will be considered as true. *Cole v. Metro. Council HRA,* 686 N.W.2d 334, 33. In determining that the Respondents had "otherwise defended" the action, the court determined that the term "otherwise defend" has not been explicitly defined by Minnesota courts

of this state. The court determined that the Defendants "otherwise Defended this lawsuit by filing a motion for sanctions in response to Plaintiff's complaint (A.11) The Court determined that this was a formal act by Defendants to position themselves in opposition to the Plaintiffs' complaint. The analysis should have stopped there, and the court, denying the default judgment would then allow the litigation to proceed.

However the district court's next step was to apply the case law designed to reopen default judgments granted by courts. The court cited *Cotter*, stating that when a default judgment is granted, then Minnesota courts have noted four requirements to reopen a default judgment that have been granted: defendant had a reasonable defense on the merits; defendant had a reasonable excuse for his failure to answer ; defendant acted with diligence after notice of the entry of judgment: and no substantial prejudice will result to the parties. Cotter v. Guardian Angels Roman Catholic Church of Chaska, 294 NW 2d. 712, 715 (Minn. 1980) (A.11).

But the default judgment was never granted in order to require an analysis that the judgment be reopened. In *Cotter*, cited by the court here, the court affirmed the lower court decision that used discretion to deny a motion for default and enlarged the time within which to answer the complaint. In *Cotter*, the Appellant had moved for default judgment because they had failed to answer the complaint, but the defendant's attorney made a motion to enlarge the time for answering the complaint which the court granted. The parties also proceeded with discovery. Id. At 714. The trial court granted defendants' motion for enlargement and denied appellant's motion for default

judgments, allowing the parties to proceed with discovery, and the Appellate Court affirmed.

As such, *Cotter* cited by the court stands for the proposition that the court has broad discretion to enlarge the time for an answer. In the context in Carter, the trial court denied appellant's motion and gave defendants an extension of time within which to answer, pursuant to Minn.R. Civ.P. 60.02, which provides in part:

> When by statute or by these rules * * * an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, * * * (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect * * *.

A trial court's action permitting a party to serve or file a pleading after expiration of a time limit is discretionary and will not be reversed unless the discretion has been abused. *Kosloski v. Jones,* 203 N.W.2d 401 (1973); *Roinestad v. McCarthy,* 82 N.W.2d 697 (1957). The case law cited by the district court here is applied to district courts who grant default judgments, and used is for reopening a default judgment that has been granted, and not the rules or law to be used by district courts when they denying a default judgment. After denying the default, the court should require an Answer.

D. The Court Erroneously Proceeded to Misapply the Law in its Failure to Expand the Time for an Answer so that the Case Could Proceed.

Since the court denied the default judgment and applied case law that allows for the expansion of time frames to require a response, the next step would be to require an Answer. Once a court determines that a party is in default, the complaint's factual

allegations, except those related to damages, will be considered as true. *Cole v. Metro. Council HRA,* 686 N.W.2d 334, 33 If the Judge grants a default, the Defendant appeals the default judgment to the appellate court, and the appellate court rules to reopen the default, the case is reversed and remanded to the trial court to proceed.

Here, the next logical next step was for the Court to require an answer so that discovery and litigation could proceed. It was error and a misapplication of the law for the court to do an analysis that relates to reopening a default that was already granted, and then not require the litigation to proceed.

In another case cited by the court, Imperial Premium Din. Inc. V. GK Cab Co., Inc, 603 NW 2d 853, 857 (Minn. App. 2000), the lower court decided to vacate a default judgment, and the Appellate court affirmed the district court's decision to vacate a default judgment. That case is also inapplicable here, as the court was not asked to reopen a default judgment that had been granted. Like *Cotter*, Imperial involved Minn. R. P. 60.02 which provided for a motion to relieve a party from judgment. There the court ruled that the decision to open a default judgment rests within the district court's discretion and will not be reversed absent an abuse of discretion. Id. At 857. Again the case law used by the court was misplaced. Imperial cited by the court had to do with a contest regarding the district court having reopened a default judgment that it had granted, where the Appellate court affirmed the reopening. In the instant case, there was no default judgment granted to reopen.

Here, if the court found that a dismissed Rule 11 motion, constituted sufficient participation to avoid default judgment, then the procedural due process of law provides

that if the default is granted, and the litigation is required to proceed, starting with an answer by the Defendant and discovery. The court found that defendant had a reasonable defense on the merits, made multiple court filings, and acted with due diligence, and that there was "no prejudice due to defendants failure to formally answer the complaint. " (A.12) The next logical step if a default judgment is not granted is to require an Answer so that the discovery could proceed.

Notably, in applying the wrong analysis, the court stated that there was a weak showing on the fourth factor, involving why the Defendant's did not answer the complaint. The district court found that "relief is warranted", citing Valley View v. Shutte, 399 NW 2d 182, 185-86 (Minn. Ct. App 1987), granting relief from a default and finding "the strong showing on these three factors must be balanced against the relatively weak showing on the [reasonable excuse] factor".

Here again Valley View was an appeal from an order denying appellant 's motion to vacate a default judgment entered against him. The defendant there contended that the judgment should be vacated for lack of personal service and because he demonstrated excusable neglect, and the appellate court ruled that appellant had met the test for vacation of default judgment, and reversed and remand. Id at 185.

Here, the court ruled as if it had granted the default judgment and was hearing a motion to reopen it. Therefore, the next logical step if the court was going to deny the default was to require an Answer, so that discovery and the litigation could proceed.

E. Plaintiff had Established A *Prima Facie* Case On The Issues Of Defendants' Liability and for Declaratory Relief.

Prima facie evidence is "evidence which, if unrebutted, would support a [favorable] judgment." Ulrich v. City of Crosby, 848 F. Supp. 861, 867 (D. Minn.1994) .While the district court denied the default judgment, the judge erred.by not requiring an Answer to determine contested facts and so that discovery could proceed. If the Judge was not going to grant a default due to Defendants participation, he was required to go the next step and required an answer of Defendant's. Due process of law was denied to Appellants considering that in the same order where the court denied their default judgment, the court dismissed their case by summary judgement as detailed below.

II. THE COURT VIOLATED PROCEDURAL DUE PROCESS BY DENYING DEFAULT JUDGMENT AND ORDERING A SUMMARY JUDGMENT DISMISSAL IN THE SAME ORDER ON PLAINTIFFS' CLAIMS OF DEFAMATION WHEN DEFENDANTS HAD NOT ANSWERED THE COMPLAINT AND THERE WAS NO DISCOVERY .

A. Standard of Review – Procedural due process.

The United States and Minnesota Constitutions guarantee the right to due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 7. "Whether the government has violated a person's procedural due process rights is a question of law that [appellate courts] review de novo." *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012).

B. ***Standard of Review - Summary Judgment***

This court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts. Commerce Bank v. West Bend Mut Ins. Co., 870 N.W.2d 770,773 (Minn.2015)

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A fact is material for purposes of summary judgment if its resolution will affect the outcome of the case. *Sayer v. Minn. Dept. of Transp.*, 790 N.W.2d 151, 162 (Minn. 2010) (citing *Zappa v. Fahey*, 245 N.W.2d 259 (Minn. 1976)). In a summary judgment motion, facts must be viewed in the light most favorable to the nonmoving party. *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

The court is not to resolve issues of fact on a motion for summary judgment, but to determine whether they exist. *Anderson v. Mikel Drilling Co.*, 102 N.W.2d 293, 299 (Minn. 1960). A genuine issue of material fact exists, precluding summary judgment, when reasonable persons might draw different conclusions from the evidence presented. *Mountain Peaks Financial Services, Inc. v. Roth-Steffan*, 778 N.W.2d 380, 387 (Minn. Ct. App. 2010) (review denied). A genuine issue may exist even if it appears unlikely that the opposing party will prevail at trial. *City of Coon Rapids v. Suburban Engineering, Inc.*, 167 N.W.2d 493, 497 (Minn. 1969)

The Appeals court must view the evidence in the light most favorable to the party against whom summary judgment was granted. In assessing the evidence the Court must resolve all doubts and inferences about the facts in the favor of the non-moving party.

Fabio v. *Bellomo,* 504 N.W.2d 758 (Min. 1981). *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Where there is room for an honest difference of opinion, summary judgment should be denied, because it is considered a "blunt instrument" that should be used only where it is perfectly clear that no issue of fact is involved. *Nord v. Herreid,* 305 N.W.2d 337, 339 (Minn. 1981). A party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis County,* 708 N.W.2d 497, 507 (Minn. 2006).

c. The Court Denied Procedural Due Process By Granting Summary Judgment Without Benefit Of An Answer Or Discovery In The Litigation.

The court's decision to simultaneously "reopen" a default judgment, and dismiss by a summary judgement failed to satisfied the constitutional opportunity to be heard on Appellants' defamation claims. The court denied a default judgment applying case law to reopen a default judgement after it was granted, which means that the next logical procedural step was to require an Answer and allow discovery and the litigation to proceed. Instead, in the same order, the court erred by dismissing the Plaintiffs case by summary judgment prematurely. The United States and Minnesota Constitutions guarantee the right to due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. 1, § 7. "Whether the government has violated a person's procedural due process rights is a

question of law that [appellate courts] review de novo." *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012).

In the litigation process, once the complaint and answer have been filed in a case, the lawsuit begins to develop. Plaintiffs did not get an opportunity to receive and review an Answer to the Complaint. After the Answer, the next stage is the fact finding process of discovery. During discovery, each party files requests with the opposing party such as interrogatories asking the opposing party to answer questions and requests for production of documents, asking for documents to be produced and admissions asking the opposing party to admit or deny questions, and depositions of witnesses. No discovery was allowed to happen. None of this fact-finding process occurred, prohibited by the court's dismissal.

Appellants argue that the district court violated their procedural due-process rights by denying a default judgment for Plaintiffs and failing to require an Answer, and then granting a summary judgment for Defendants in the same order. Consequently, summarily dismissing Appellants' defamation claims as set forth in the Complaint was premature. Appellants argue that the court's approach to disposing of the defamation, defamation per se and defamation by implication claims by summary judgment constituted a misapplication of the law.

"[P]rocedural due process guarantees reasonable notice and a meaningful opportunity to be heard." *In re Khan,* 804 N.W.2d 132, 137 (Minn. App. 2011). Whether procedural due-process rights have been violated is a question of law that the court reviews de novo. *Plocher v. Comm'r of Pub. Safety,* 681 N.W.2d 698, 702 (Minn. App. 2004).

Appellants due-process arguments involve the fact that the judge denied a default judgment and in the same proceeding and same order granted a summary judgement for the Defendants. It was determined that the Appellants' complaint stated a prima facie case of defamation, and there was no Rule 12 motion before the court. Appellants had received no answer to the Complaint, and had no opportunity to conduct discovery to gather the evidence to bring or defend a summary judgment dismissal. While the court considered that the Defendants had "otherwise defended " to avoid a default, the court had also ruled that the Defendants made a weak showing as to reasonable excuse for failure to Answer. While denying the default judgment was discretionary with the court, to turn around and order a dismissal by summary judgment in the same order, without Plaintiffs having received any Answer to the numerous allegations in the complaint and without the benefit of discovery was error. By rejecting the request for default judgment, and failing to require that Defendants answer to allow the litigation to proceed, the Appellants were deprived of the opportunity for discovery, and a meaningful opportunity to be heard regarding the defamation claims in their Complaint. Appellants submitted their complaint but had no opportunity to proceed with the litigation.

D. Plaintiff had Established A *Prima Facie* Case On The Issues Of Defendants' Liability for Defamation.

Appellants complained that statements made by the Defendants defamed them. To establish the elements of a defamation claim in Minnesota, a plaintiff must prove that: (1) the defamatory statement was "communicated to someone other than the plaintiff; (2) the statement is false; (3) the statement tends to "harm the plaintiff's reputation and to lower

[the plaintiff] in the estimation of the community," *Bahr v. Boise Cascade Corp.,* 766 N.W.2d 910, 919–20 (Minn.2009); and (4) "the recipient of the false statement reasonably understands it to refer to a specific individual." *State v. Crawley,* 819 N.W.2d 94, 104 (Minn.2012). estimation of the community," ...; and (4) "the recipient of the *McKee v. Laurion*, 825 N.W.2d 725, 729-30 (Minn. 2013). In their Complaint, Plaintiffs made a prima facie case for defamation, defamation per se and defamation by implication.

Appellants presented sufficient evidence in their complaint to establish a prima facie case of all of the elements of its claim of defamation, defamation per se and defamation by implication. In its decision, the court disregards the facts in the verified Complaint demonstrating Respondents were defamatory as to Appellants. The Court immediately upon determining that it was not going to grant a default judgment, ruled for judgment as against the Plaintiffs. Accordingly, the district court erred in granting summary judgment dismissing Appellants claims.

Plaintiffs allege in the Complaint that Defendants intentionally and maliciously made false and defamatory written and verbal statements concerning Ms. MacDonald, the natural tendency of which is to hold her up to hatred, scorn, contempt, ridicule and disgrace in the minds of right-thinking persons, and to deprive her of their friendly society. Plaintiffs further allege that Defendants' publication of knowingly, intentionally and maliciously false and defamatory statements has negatively affected and will continue to negatively affect Ms. MacDonald in connection with her profession.

Defendants' website, taken as a whole, including the false images, creates a false implication concerning Ms. MacDonald's career as a lawyer, as involved in ongoing criminal activity, ongoing criminal investigation by police, a felon, a drunk, mentally ill, and false implications about her honesty and job performance and the circumstances surrounding the representation of her clients, and her employment as an attorney. The website statements and false representations in the images imply that in Ms. MacDonald's employment as an attorney, she committed criminal acts and continues to commit criminal acts while representing her clients and is under criminal investigation, which is false, Appellants argue that the Judge misapplied the law as the summary judgment was granted without any Answer to the Complaint and without any discovery having been conducted whatsoever relating to the Plaintiffs claims. As such the granting of dismissal by summary judgment was premature.

E. The Dismissal By Summary Judgment was Premature

Rule 56.Summary Judgment provides that:

56.01Motion for Summary Judgment or Partial Summary Judgment

A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense - on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. The court shall state on the record or in a written decision the reasons for granting or denying the motion.

The rule further provides that a party asserting that there is no genuine issue of material fact must support the assertion by citing to the record including "depositions, documents, electronically stored information, affidavits, stipulations (including those made for

purposes of the motion only), admissions, interrogatories or other materials . The Rule further provides:

56.03Procedures

(a)Supporting Factual Positions.

A party asserting that there is no genuine issue as to any material fact must support the assertion by:
(1) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
(2) showing that the materials cited do not establish the absence or presence of a genuine issue for trial, or that an adverse party cannot produce admissible evidence to support the fact.

The documents relied on by the Respondents consisted of one (1) short affidavit of Defendant Brodkorb. (A. 71) The issue for consideration was whether the Defendants defamed Appellants. The court found that "there were no issues of material fact precluding judgment on the basis of truth or absence of malice" (A.16) . While truth is a complete defense to a defamation action and "true statements, however disparaging, are not actionable." *Stuempges v. Parke, Davis & Co.,* 297 N.W.2d 252, 255 (Minn.1980). As a general rule, the truth or falsity of a statement is a question for the jury. *Lewis v. Equitable Life Assurance Soc'y of the United States,* 389 N.W.2d 876, 889 (Minn.1986). Also, the court proceeded in backwards fashion, ruling on the defense, without ruling on the Plaintiffs' defamation case in chief. What the court did was misapply the rule by ruling only on the Defendants' claimed defense--- truth or absence of malice--- which was premature.

The court wrongly asserts that "Plaintiff's amended complaint alleged three defamatory statements by defendants" (A.16). In fact, the complaint was not confined to three defamatory statements. It was the affidavit by Defendant Brodkorb in support of the motion for summary judgment that confined the defamatory statements to three. (A.71). The court then proceeded to resolve factual disputes as to the truth or falsity of of the statements relating to these three issues, which is prohibited and left for the jury. In doing so, the district court ignored the elements of defamation relating to a Plaintiffs case..

The Complaint was not at all limited to the "three defamatory statements" set forth in Defendant's Affidavit. The court, limited its analysis to three defamatory statements, ruling that "they are either factually accurate or there is an absence of material fact relating to actual malice" (A.17)

As to the false allegation that Ms. MacDonald was convicted for a DUI, the court mentioned the Plaintiffs' Amended Complaint referenced a post on February 16, 2016 that defendant had a DUI conviction. With respect to this allegation, the Defendants affidavit set forth a different post, not in the Complaint, which was a May 18, 2016 article on Missing in Minnesota (A. 75). This was not the February 16, 2016 post referenced in the amended complaint. The district court then states "the record, however, is devoid of any evidence of the purported tweet from February 16, 2016" (A.17) But the truth is the only record was the verified Complaint and Defendant Brodkorb's short affidavit. Appellant Ms. MacDonald's statement about the February

16, 2016 post was not denied by the Defendants, but instead they referred to post, and not the post that Appellant Ms. MacDonald was referencing in her complaint. The post she referenced in her Amended Complaint dated February 16, 2016 that "the DWI conviction of former state supreme court candidate Michelle MacDonald was upheld Tuesday by the Court of Appeals. (A. 58) There were facts in dispute as to Defendants' statements relating to a conviction for DUI, which statement was false. In response , Respondents provided one of dozens of posts subject to discovery, relating to the complaint, but not the one that he had posted as identified in the Appellants Complaint. (A. 58) This post clearly sets forth that a DUI conviction was upheld, which is false. The court rules in summary judgment by review of evidence that has been turned over in discovery, which Respondent had no opportunity.

The court also proceeded to address that Defendants had identified Ms. MacDonald as a "person of interest", referencing only the two examples specified in Defendant Brodkorb's Affidavit, on October 22, 2015 and August 3, 2016. (A.7). The court proceeded to define "person of interest " as a person who is believed to be possibly involved in a crime but has not been charged or arrested. " (A.18) .Then the court proceeds to determine the truth or falsity of that the two statements relating to disputed facts using only the two occasions on which it was posted, October 22, 2015 and August 3, 2016 where it was stated by Defendant Brodkorb that Ms. MacDonald was a "person of interest." The court acknowledges that this fact is disputed by Ms. MacDonald (A.8). The court notes only the two references that were alleged in Defendant Brodkorb's affidavit. (A. 18)

The court notes that Defendant Brodkorb used this term because Ms. MacDonald had been identified as a "person of interest" in an April 2015 article by Brandon Stahl (A-18) Defendant Brodkorb claims in his affidavit the phrase was repeated in subsequent articles. The court noted that Defendant Brodkorb asserted that the Lakeville police told him that Ms. MacDonald was a person of interest, but her does not identify when. (A.19). and Ms. MacDonald claims that she too spoke with Lakeville police who confirmed she was not a person of interest (A.19).

Summary judgment is proper only where the moving party demonstrates there are no genuine issues of material fact. Minn. R. Civ. P. 56.03. A material fact is one that will affect the result or outcome of the case, depending upon its resolution. Zappa v. Fahey, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976). The court erred by proceeding to do a hearsay analysis, claiming that Defendant Brodkorb's statements concerning whether Ms. MacDonald was a person of interest is admissible under the hearsay rule, and that Brodkorb's "state of mind" is the issue, going to malice or recklessness. The court then determines that Ms. MacDonald's affidavit is inadmissible hearsay (A.20).

The court concludes that "whether MacDonald was, in fact, a "person of interest" cannot be determined based on the record before the court, " while not deciding the truth or falsity of the statement. The court further determines that "the record is devoid of evidence that Defendants broadcast their statements that MacDonald was a "person of interest" knowing the information was false or that Defendants entered serious doubts as to the truth of the statements.(A.21) On this basis , the court erroneously concluded that "summary judgment is proper on this alleged defamatory statement in absence of any

issues of material facts relating to actual malice" , the court having inappropriately determined the facts. (A. 21)

Then there is the manner in which the court addressed the use of a photograph "as if a mug shot". Here again, the court cites only two of the instances mentioned in Brodkorb's affidavit of posting the photograph, when there were many more. The court acknowledges that "there are no references in the tweet that it is a mug shot or booking photo. (A.9) The court proceeded to analyze the photo as a mug shot, and that Brodkorb did not refer to the photograph as a mugshot, and only references two of the posts, June 5, 2018 as to her candidacy, and January 5, 2017, as to her mental health evaluation request. (A.21), The court proceeds to state that "it is arguably not a flattering photograph of MacDonald ,but there is nothing about the photo that suggests it is a mugshot or booking photograph. "(A. 22)

The court compared it with the mug shots of Sandra Grazzini-Rucki on the website, and states its opinion that "not even the reference to MacDonald as being a person of interest in the June 5, 2018 tweet transforms the photograph into anything more than an unflattering image of Plaintiff MacDonald, which Defendant's placed besides a photograph taken from her promotional campaign materials for Supreme Court. (A.22)

The court states that "What Plaintiffs are really arguing is that the unflattering photograph and caption containing the reference to MacDonald being a "person of interest, even if true or lacking actual malice , are defamatory by implication. (A.22) . Discerning such facts is prohibited in a summary judgment motion.

F. The Respondent's Short Affidavit Failed to Support a Dismissal of Plaintiffs claims on Summary Judgment

The court erred by not requiring an Answer and using the 3 page affidavit of one of the Defendants to support a motion for summary judgment when the Affidavit asserted facts that were contested, looking the only three factual issues raised by Defendant Brodkorb's short affidavit, disregarding the numerous allegations in the Complaint. In doing so the court determined that that a few of the posts statements were not actionable. The Affidavit asserted contested facts. Contrary to law, the court determined facts relating to only two "person of interest" posts, one publication of the photo, and one DUI post by Defendant, adopting the assertions by Defendant Brodkorb in his affidavit.Notably, none of the other fact issues raised in the Complaint are addressed, and the Court proceeds to dismiss the Complaint in its entirety.

Under Rule 56.03, Minn.R. Civ.P., a summary judgment may be granted to either party if "there is no genuine issue as to any material fact." In construing this rule, this court has held that "the moving party has the burden of proof and * * * the nonmoving party has the benefit of that view of the evidence which is most favorable to him." Sauter v. Sauter, 70 N.W.2d 351, 353 (1955); see 2 J. Hetland & O. Adamson, Minnesota Practice 571 (1970). All doubts and factual inferences must be resolved against the moving party. Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 605 (1957); 2 J. Hetland & O. Adamson, supra at 572.

As the Anderson court stated, "it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." Anderson

v. Twin City Rapid Transit Co. 84 N.W.2d at 605 (Minn. 1957) . The care with which an inquiry required by Rule 56.03 should be conducted was emphasized by this court in Donnay v. Boulware, 144 N.W.2d 711 (1966). There, the Court stated that "summary judgment is a `blunt instrument' and * * * should be employed only where it is perfectly clear that no issue of fact is involved." Id. at 45, 144 N.W.2d at 716.

The case was not confined to the three factual issues, and the couple of posts that Defendant Brodkorb outlined in his Affidavit, and the court ruled on. Even so, the court resolved issues of fact, that are left to the jury. Several issues of material fact exist because Defendants never provided an Answer to the Complaint and there was no discovery.

The Court may not make credibility determinations in deciding whether to grant summary judgment. Powell v. Anderson, 660 N.W.2d 107 (Minn. 2003). In assessing the evidence the Court must resolve all doubts and inferences about the facts in the favor of the non-moving party. Fabio v. Bellomo, 504 N.W.2d 758 (Min. 1981). The trial court's role is not to decide fact issues at the summary judgment hearing. Hamilton v. Ind. Sch. Dist. No. 114, 355 N.W.2d 182, 184 (Minn. App. 1984). Rather the trial court determines if there exists room for an honest difference of opinion among reasonable people, and denies the motion where such debate is possible. Trepanier v. McKenna, 267 Minn. 145,125 N.W.2d 603, 606 (1963). Where there is room for an honest difference of opinion, summary judgment should be denied, because it is considered a "blunt instrument" that should be used only where it is perfectly clear that no issue of fact is

involved. Nord v. Herreid, 305 NW2d 337, 339 (Minn. 1981). In the context of summary judgment, a party cannot argue the relative trustwollhiness of the affidavits; as such an argument would raise issues of witness credibility.

The court's application in determining whether there is an absence of a genuine issue as a material fact requires a careful scrutiny of the pleadings, depositions, admissions, and affidavits, if any, on file. Sauter v. Sauter, 244 Minn. 482, 485, 70 N.W.2d 351, 353 (1955). But here, there were no pleadings, depositions, admissions or affidavits to scrutinize, the Court ignored the Complaint, and ruled based on a short Affidavit supplied by Defendant Brodkorb purporting to address three factual issues and a couple of posts. (A. 71). There were no witness depositions, no witness admissions or affidavits and no discovery. The court's findings indicates a failure to thoroughly scrutinize the pleadings, depositions, admissions and affidavits on file.

The court refers to a "record" that Appellants never had the opportunity to present for its consideration. The court's failure to allow Appellants to proceed with discovery and the litigation after denying a default judgment, represents cursory review of the prima facie evidence and a misapplication of the law because it was in contravention of Minn. R. Civ. P 56.03. Essentially there was no "evidence" to review which is a procedural due process violation.

Defendants never affirmatively admitted or denied any of the facts as alleged in the complaint, or the existence of any of the elements of defamation. In light of the Courts failure to require and answer and allow discovery, this is clear error. For

purposes of dismissing Appellants claims for defamation against Respondents, genuine issues of material fact existed with respect to whether or not Respondents' multiple actions as outlined in the Complaint were defamatory and required submission to a fact-finder.

On this record, the Appellants established that Defendants Brodkorb committed defamation. Therefore, the court erred when it failed to require an Answer and found that there were facts establishing a defense, implying that that Respondents were not responsible for defamation. Appellants presented a prima facie case of defamation sufficient to preclude dismissal by summary judgment.

III THE COURT DENIED DUE PROCESS IN GRANTING SUMMARY JUDGMENT DISMISSAL WHEN IT RULED RESPONDENT COULD NOT BE FOUND LIABLE ON APPELLANTS' CLAIMS FOR DEFAMATION BY IMPLICATION WHEN THERE WAS NO ANSWER OR DISCOVERY AS TO THE FACTS INCLUDING WHETHER OR NOT THE PLAINTIFF WAS A PUBLIC OFFICIAL OR A PRIVILEGE APPLIED

A. Standard of Review – privilege

Whether a privilege exists for defamation is a legal issue that is reviewed de novo. Bol v. Cole, 561 N.W.2d 143, 149 (Minn. 1997) (existence of privilege is a question of law); Lewis v. Equitable Life Assur. Soc., 389 N.W.2d 876, 890 (Minn. 1986).

On summary judgment, whether the evidence in the record is sufficient to support a finding of actual malice by clear and convincing evidence is a question of law which the appellate court reviews de novo. Chafoulias v. Peterson, 668 N.W.2d 642, 655 (Minn. 2003).

B. The Court Erred by Dismissing Defamation by Implication in Summary Judgment.

Without any answer or discovery of any sort, the Court ruled that in public figure defamation cases, the test on summary judgment "is whether the evidence on the record

could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence. Foley v. Wcco television , Inc. 449 NW 2d 497, 503 (Minn. Supp. 1989) (A.15) Ms. MacDonald had no opportunity to respond to the courts findings, except by appeal, the court sua sponte determined that Ms. MacDonald is a public figure and subject to the heightened actual malice and convincing standard in dismissing her case (A. 16). Then the court proceeded to rule, after finding Ms. MacDonald to be a public figure , not only that actual malice was required, but that actual malice did not exist, dismissing her defamation claims entirely (A. 16) This is to say nothing about the dismissal of Plaintiff MacDonald Law Firm, LLC's case.

The court used case law outside of the context of defamation, that stands for the proposition "One who volunteers {herself} as a candidate for public office becomes a public figure and is subject to greater scrutiny as [she] aspires for positions of higher responsibility" Klaus v. Minn. State. Ethics Comm'n 244 NW 2d 672, 676 (Minn. 1976). *Klaus* was not a ruling in the context of defamation. The court cited Foley v. Wcco Television Inc. 449 NW 2d 497, 503 (Minn. App. 1989), involving a television news organization against a sitting county prosecutor. *Foley* concerned a public official, not a candidate for office. Foley also concerned defamatory criticisms about acts done in his official capacity as county attorney. Foley, infra at 500. Diesen, also cited by the court, like Foley, concerned a reporter as against Donald Diesen, a County Attorney, referring to his report as "the Diesen probe." Diesen v. Hessburg, 455 N.W. 2d 446, 448 (Minn. 1990) cert. denied, 498 U.S. 1119 (1991). Here too, Diesen was a public official, not a candidate who ran for public office and lost.

Ms. MacDonald ran for office and lost the elections in November of 2014, and 2016, and was running for office at the time of the lawsuit. While Ms. MacDonald was not given procedural due process with respect to the court's ruling, it is clear the district court not only conflated public figure with a public official, but also determined that when some runs for public office and losses, that they are a public official in the context of defamation.

The district court cited Klaus v. Minn. State Ethics Comm'n, 244 NW 2d 672, 676 (Minn. 1976) for the proposition that candidates are public figures, not a defamation case. Ms. MacDonald never had the opportunity to claim that unlike county attorney Foley, she was not a public official. Nor were these defamatory remarks criticisms of official conduct, which the Foley ruled are not defamatory as a matter of law. In any event, the defamation by Defendant Brodkorb, as alleged in the complaint, was prolonged over a period of years, including periods when Ms. MacDonald was not a candidate for office. Ms. MacDonald had developed a relationship with Defendant Brodkorb, since July 2014, where she shared information, and it was after she began thwarting his advances for interviews, and her client received a restraining order against him, that he started the website, and posted the defamatory content about her and the objectionable false image which photo had not surfaced for years, knowing the circumstances of the photo, and then posting it over and over and over again after the letters she wrote to cease and desist.

Ms. MacDonald's claims of defamation, also against Missing in Minnesota, an organization that publishes the website, were ongoing. She was not a public official and

it was an issue as to whether the Defendants had any privilege. The court erred in ruling on this contested issue, finding that Ms. MacDonald is a "public figure" , that actual malice is required, and then ruling that malice did not exist. This constituted a misapplication of the law in the context of the motions. The ruling in no way explains the dismissal of the defamation as to Plaintiff MacDonald Law Firm, LLC.

C. **Defamation by Implication is a Claim in Minnesota.**

Defamation by implication or innuendo is a claim in Minnesota and it was erroneously denied on summary judgment. While the law in Minnesota concerning defamation by implication is somewhat unclear, it exists. While the Minnesota Supreme found that defamation by implication is not recognized in cases involving defamation of public officials, Ms. MacDonald was not a public official, nor did she have the opportunity to present the defamation as alleged in her complaint, or show the malice if it was in fact required. The Eighth Circuit has stated that defamation by implication is a theory of liability in Minnesota despite the ruling in Diesen. See Michaelis v. CBS, Inc., 119 F.3d 697 (8th Cir. 1997) and Toney v. WCCO Television, Midwest Cable & Satellite, Inc., 85 F.3d 383 (8th Cir. 1996).

So too, the Diesen case "does not modify the general principle that courts must interpret the defamatory-meaning element of a defamation action in light of the context surrounding the alleged defamatory statements." Schlieman v. Gannett Minnesota Broadcasting, Inc., 637 N.W.2d 297, 304-05 (Minn. Ct. App. 2001).

In Toney the Eighth Circuit found that defamation by implication occurs when a defendant "'[1] juxtaposes a series of facts so as to imply a defamatory connection between them, or [2] creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.'" Toney, 85 F.3d at 387 (8th Cir. 1996) (quoting Diesen, 455 N.W.2d at 450 (Minn. 1990). There were falsehoods set forth in the complaint, and the court here even acknowledged the existence of defamation by implication stating that "one may infer negative connotations from statements that "MacDonald is a "person of interest" , and the "multiple publication of an unflattering photograph that makes no reference to the photograph being a mugshot but reminds readers that MacDonald is a "person of interest" in the disappearance of two your girls"." A 24

For a claim of defamation by implication a defendant cannot defend a claim merely by establishing that the statement at issue is true, rather he "must also defend the juxtaposition of two statements or the omission of certain facts." Toney, 85 F.3d at 387. "The question whether a claimed defamatory innuendo is reasonably conveyed by the language used is for the court to determine ... [and] [i]f the words are capable of the defamatory meaning, it is for the jury to decide whether they were in fact so understood." Utecht v. Shopko Dep't Store, 324 N.W.2d 652, 654 (Minn. 1982).

Here the Appellants complaint alleged the Defendants' ongoing posts about missing children-----who are no longer missing ------ and Ms. MacDonald being a "person of interest" ------ when the criminal case against her client has been concluded for years., convey falsehoods. The website's falsehoods include an unflattering photo that Ms. MacDonald shared with Defendant Brodkorb the true circumstances of taken years ago, juxtaposed near mugshots of convicted felons publicly visible perpetually on his website. When Appellants requested that Defendants take the photo and defamatory comments down, it refused to comply. The photo and comments seen by the public necessarily prompted speculation as to criminal activity by Appellant MacDonald and her law firm. Here the district court stated that a bad photo is a possible explanations but criminal arrest, criminal activity, mental illness, drunkenness is at least equally likely alternative.

The innuendo that one is a criminal, drunk, and mentally ill is clearly defamatory and it would be up to a jury ----- not a judge -------to determine whether that meaning was the one actually conveyed. Id. at 654 (see also McKee, 825 N.W.2d at 731-32). Defendant Missing in Minnesota, LLC, run by David Rucki's paralegal, Allison Mann, knows that the Ms. MacDonald was an attorney and the case was resolved with criminal convictions. Even if it was true that at one time in the distant past a police officer told Brandon Stahl that Ms. MacDonald was a "person of interest," by refusing to say it is not true in the present day is a

lie by omission. Reasonable persons could assume from the perpetual statement that Ms. MacDonald is currently being investigated by the police, is currently a person of interest, and is currently not cooperating, or was or has been arrested in the case due to the photo.

Thus, it is what was omitted by Defendants that Plaintiff is no longer a person of interest, nor are the circumstances of the photo which Defendant Brodkorb knows of, provided on the website. Defendant Brodkorb is aware as alleged in the complaint, that the photo was taken during her tortuous treatment, and not at the time of any arrest, that Ms. MacDonald, and that the court released her and she was not booked, and that the case for contempt of taking the photo in court of the deputy on September 12, 2013 was dismissed. Ms. MacDonald was exonerated and the case was dismissed - that permits a defamatory inference. Defendant Brodkorb fancies himself an investigative reporter, so that is even more egregious because he knows , but disregards, the true facts and chooses to disseminate fake news by violating ethical rules. Whether or not the defamatory innuendo was, in fact, so understood is an issue for the jury. Therefore, the Court erred by granting Defendants motion for summary judgment on this claim.

D. THERE IS NO "PRIVILEGE" IN THIS CASE AND, EVEN IF THERE WERE, FACTUAL ISSUES EXIST REGARDING COMMON LAW MALICE

a. 'Public Interest' Privilege Is Inapplicable

Given the opportunity, Appellants would argue there is no "qualified privilege" for the accusation of criminal improprieties made by Defendants Michael Brodkorb and Missing in Minnesota. There are four elements, all of which must be satisfied, to establish a "qualified privilege:" statements made in "good faith," on a "proper occasion," with a "proper motive," and with "reasonable and probable cause." Wirig v. Kinney Shoe Corp, 461 N.W.2d 374,380 (Minn. 1980); Lewis v. Equitable Life Assur. Soc. of US , 389 N.W.2d 876, 889 (Minn. 1986). If a statement is protected by 'qualified privilege,' which in this case it is not, then the Plaintiffs must prove common law malice to overcome it. Stuempges v. Parke, Davis & Amp, 297 NW. 2d 252, 255 (Minn. 1980) While the privilege defense must satisfy all of these standards, Appellants here would argue, if given the opportunity, that the Respondents satisfy none of them. Because dissemination of the accusations of criminal activity by Appellant Ms. MacDonald, was not to protect or report a crime, they do not qualify for privilege under the reasoning of Bol or other case law. Bol v. Cole 561 NW 2d 143 (Minn. 1997).

Furthermore, the "proper" occasion to make these accusations in the absence of any need to "protect" the public from any current or threatened future wrongdoing is unlike the contemporary exposure to harm that characterized the Bol case. The muckracking website is not a "proper" occasion or "proper" motive for invoking a privilege here. Further, there was no "reasonable or probable cause," or any cause at all, for the defamatory statements that Ms. MacDonald is a "person of interest" to be uttered. These are serous accusations made by and disseminated by Defendants Brodkorb and Missing in Minnesota, throughout the web and, on social media, to the world at large.

Apparently Respondents regurgitate whatever it is they told, and keep it frozen in time, as a snapshot, without any additional investigation or regard for the truth (or falsity), of the statement months or years later . The Respondents here could not have had any reasonable or probable cause to believe the accusations made by the police, years ago, particularly in the absence of any documented law enforcement record or court proceeding relating to Appellants.

Additionally, Defendant Brodkorb was placed on notice of the falsity of the accusations by text and numerous letters from Ms. MacDonald , but he ignored the warnings and proceeded to ramp up the defamation and post over and over again the objectionable false image and use it in his website.

Appellant would challenge the court's determination that there was a privilege. In fact, it was the court itself that brought up the privilege due to its view of a case, which this Court must reversed. The privilege or "public interest" does not give individuals or organizations license to defame, or make unwarranted, unproven, (and unprovable) accusations of criminality, without proof, any inquiry, and no investigation.

The privilege does not elevate the Respondents above the law. If it did, then no innocent person, like Ms. MacDonald, would be able to seek redress when they are the subject of unwarranted accusations of criminality or other misbehavior. Defendants are not entitled to publish whatever it wants, without reasonable cause, trampling over the rights and reputations of others. Further, creating an exception here establishes a dangerous incentive for defamation Defendants and their attorneys.

b. Common Law Malice Defeats The Privilege

Ms. MacDonald was denied procedural due process or the opportunity to introduce common law malice. Even if a privilege exists here, which it does not, it is overcome by common law malice, an issue not addressed by the court because the court should not have dismissed this matter on summary judgment.

The type of malice that can defeat such privilege, may consist of personal ill will or exaggerated or hyperbolic language or failure to conduct a reasonable investigation. Bahr, 766 N.W.2d at 920. As the Courts have repeatedly held, in order to sustain a qualified privilege to overcome malice, a party must have "reasonable or probable grounds for believing in the validity of the statement(s)" in question. E.g., Wirig, 461 N.W.2d at 380. The privilege claim was not even able to be flushed out here. It failed in Wirig because the "facts here indicate that no investigation occurred to substantiate the charges" of criminality asserted in that case. Id. The absence of any inquiry, before making defamatory utterances constituted common law malice in Wirig to defeat the claimed privilege. This was based on the principle that one who "takes no steps to investigate but relies entirely on accusations either made by [others] who may be biased... has not acted as a reasonable prudent person and lacks probable or reasonable grounds for making a potentially defamatory statement. Id. at 380-81. The same is true in this case, where there was not just an unreasonable investigation but, as in Wirig, there was no continued investigation at all. 401 N.W.2d at 380. Appellants alleged in the Complaint that Defendant payed no heed to whether the posts were true or false at the present or any given time, along with the absence of any steps to check on the veracity of what it

was published, Respondents have not acted responsibly or in a proper way. This dereliction alone creates a fact issue as to common law malice, which defeats any privilege for Respondents. Defendant Brodkorb does not edit the articles or check its accuracy in any way as to the current time. Respondents followed the criminal case and knew the case was concluded and still persists in leaving defaming material on his website as if it were current day. Providing a website forum for Defendants Brodkorb to defame Appellant MacDonald, without any oversight at all, does not entitle the Defendants to a libel free zone for insensitivity and extremely reckless behavior. Nor do Respondents deserve a free pass for defamation, either.

Defendants' ill will is manifested in that reference to Ms. MacDonald as a perpetual "person of interest" These venomous views create, at a minimum, a fact issue regarding common law malice, which overcomes any privilege, if one existed here, which it does not.

In sum, there is no "privilege," qualified or otherwise for Respondents to make the accusations of criminality against Ms. MacDonald, in the absence of any proper occasion, proper motive, or investigation giving any reasonable probable cause to believe the veracity of the posts. This court can reject the claimed privilege and, even if one existed, there is ample evidence upon which a trier-of-fact could find malice, which would trump any privilege.

Numerous cases in Minnesota and elsewhere stand for the proposition that publishers may be liable for information published if they fail to act with due care, which means, at a minimum, some reasonable efforts to verify what they publish. Indeed, this has been the

law in Minnesota for more than a century, holding publishers liable for defamatory statements made in publications if they do not act with due care in investigating the accusations. E.g. American Book Co. v. Kingdom Pub. Co.,363, 73 N.W. 1089 (1898); Mahnke v. Northwest Publications, Inc., 337 160 N.W.2d 1, 7-8 (1968); ("reckless failure to find out the true facts before publication"); Hammerstein v. Reiling, 208, 115 N.W.2d 259, 265 (1962); (publication held liable because defendant presented no evidence that charges were true or that he attempted to investigate them).

These cases are well grounded in fundamental and legal principles: liability for defamation is imposed upon "one who repeats or otherwise republishes defamatory matter ... as if he [sic] had originally published it." Restatement (2d) Torts, § 578 (1977); Stuempges v. Parke, Davis & Amp, 297 NW. 2d 252, 255 (Minn. 1980) ; W. Prosser, Handbook of the Law of Torts, § 113, p. 768 (4th ed. 1971). See also Lewis, 389 N.W.2d at 886. This law is universally followed in other jurisdictions. See Cianci v. New Times Pub. Co., 639 F.2d 54, 60-61 (2d Cir. 1980); See also Olinger v. United Savings & Loan Assoc., 409 F.2d 142, 144 (D.C. Cir. 1969). As a federal court in Minnesota has stated, publishers of defamatory material "are as liable for publication of a defamatory statement as if they had made the statement themselves." Price v. Viking Press, Inc., 625 F.Supp. 641, 644-645 (D. Minn. 1985), aff'd. sub nom, Price v. Viking Penguin, Inc., 881 F.3d 1926 (8th Cir.1989) (citing W. Prosser, Handbook on Torts § 111). Respondents' plea to be entitled, without recourse, to disseminate defamatory accusations against Appellants, on the Missing in Minnesota website with impunity and immunity to boot, is not the law; it would be bad law and nefarious public policy as well.

CONCLUSION

For the above reasons, the decision of the district court should be reversed and the case remanded to require the Respondents to answer the Complaint and to proceed with discovery of the Appellants' claims.

Respectfully submitted,

/s/ Karlowba R. Adams Powell

Dated: August 19, 2019

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements as set forth in Minn. R. Civ. App. P. 132.01. The length of the brief is 12,019 words. The brief was prepared using Microsoft Word 2010. The brief contains 13-point Times New Roman font.

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